[No. 58600-4. En Banc.

MARY E. HARRIS, Petitioner, v. SKI PARK FARMS, INC., Respondent.

(Filed Feb. 11, 1993)

[1] Judgment – Summary Judgment – Issues of Fact – Material Fact – What Constitutes. For purposes of a summary judgment proceeding, a material fact is one upon which the outcome of the litigation depends.

[2] Judgment – Summary Judgment – Review – Role of Appellate Court. When reviewing a summary judgment, an appellate court engages in the same inquiry as the trial court. It considers the facts submitted and all the reasonable inferences therefrom most favorably toward the nonmoving party and upholds the summary judgment if reasonable persons, after considering all the evidence, could reach only one conclusion.

[3] Easements – What Constitutes – Distinguished From Right of Way. An "easement" is a right, distinct from ownership, to use the land of another in some way, without compensation. A "right of way" is a right of passage over a tract.

[4] Property – Right of Way – Conveyance – Easement or Fee. Whether a conveyance of a right of way is a fee simple interest or an easement presents a mixed question of law and fact. The intent of the parties is a question of fact; the legal consequences of the intent is an issue of law.

[5] Deeds – Construction – Intent of Parties – Parol Evidence. A deed is construed so as to give effect to the parties' intent which is derived from the entire instrument. If the deed is ambiguous, the court may

consider the situation and circumstances of the parties at the time of the grant.

[6] Deeds – Exception – Scope – Intent of Parties. The nature of the property interest subject to an exception in a deed depends on the intent of the parties.

[7] Contracts – Construction – Extrinsic Evidence – Context Rule – In General. Extrinsic evidence regarding all the circumstances surrounding the making of a contract is admissible as an aid in determining the parties' intent. The admission of extrinsic evidence is not dependent on the presence of an ambiguity in the contract.

[8] Deeds – Construction – Intent of Parties – Against Grantor. An unambiguous deed is construed in accordance with the parties' intent; it is not necessarily construed in favor of the grantee.

[9] Contracts – Construction – Intent of Parties – Subsequent Conduct. Evidence of party's conduct after entering into a contract is admissible as an aid in determining the party's intent at the time of entering into the contract.

Railroads – Right of Way – Abandonment – Conveyance With Exception – (Subject of Action).

Property – Right of Way – Distinguished From Easement – (Subject of Action).

BRACHTENBACH and ANDERSEN, JJ., concur in the result only; MADSEN, J., did not participate in the disposition of this case.

Nature of Action: Action to quiet title to a railroad right of way that was abandoned before common grantors had conveyed their interests to the plaintiff and the defendant. The plaintiff acquired her interest by warranty

deed containing an exception for the railroad right of way. The defendant later acquired its interest by quitclaim deed.

Superior Court: The Superior Court for Pierce County, No. 87-2-01090-8, E. Albert Morrison, J., on September 7, 1988, entered a summary judgment quieting title in the plaintiff.

Court of Appeals: The court at 62 Wn. App. 371 *reversed* the judgment and *quieted title* in the defendant, holding that the grantors had retained their fee interest in the right of way by excepting it from the conveyance.

Supreme Court: Holding that the grantors and the plaintiff intended to except a fee interest, not an easement, in the railroad right of way and that such fee interest was conveyed to the defendant in the quitclaim deed, the court *affirms* the decision of the Court of Appeals.

Sampson & Wilson, Inc., P.S., by *Susan Rae Sampson* and *Duncan C. Wilson*, for petitioner.

Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim, by *Bradley A. Maxa*, *Donna R. Roper*, and *Stephanie A. Arend*, for respondent.

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IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

MARY E. HARRIS,	)	Number 58600-4
Petitioner,	)	En Banc
v.	)	(Filed Feb. 11, 1993
SKI PARK FARMS, INC.,	)	
Respondent.	)	

SMITH, J. – Petitioner Mary E. Harris asks for review of a decision of the Court of Appeals reversing the trial court's summary judgment which quieted title in petitioner to a parcel of property burdened with a railroad right of way. The Court of Appeals remanded to the Superior Court with instructions to enter summary judgment quieting title in Respondent Ski Park Farms, Inc. We granted review and affirm the Court of Appeals.

The single issue before the court in this case is whether the Court of Appeals erred in granting summary judgment in favor of Respondent Ski Park Farms, Inc., and ruling that a statutory warranty deed from its predecessor in title, Winkelman, to Petitioner Harris reserved or excepted a fee interest, and not merely an easement, in the abandoned railroad right of way property.

On July 2, 1864, pursuant to the 1864 Land Grant Act,[1] Northern Pacific Railroad Company (Northern Pacific) acquired ownership to a parcel of land described in the original handwritten conveyance as "the East half

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[1] Land Grant Act of 1864, 13 Stat. 365.

of the North East quarter of section twenty-seven (27) of Township nineteen (19) North, range five (5) East of the Willamette Meridian."[2] Petitioner Harris in her brief refers to the property as the "southeast quarter of the northeast quarter of Section 27, Township 19 North, Range 5 E."[3] On August 12, 1876, the Northern Pacific Railroad Company, by deed, conveyed certain property in Pierce County to Samuel Wilkeson, Jr. The deed included the legal description of the disputed property and contained an exception as follows:

> [The] East half of the North East quarter of section twenty seven (27) of Township nineteen (19) North, range five (5) East of the Willamette Meridian. . . .
>
> [R]eserving and excepting, however, from the above described premises *a strip of land two hundred feet wide, extending through the same on the line of the railroad* of the said Northern Pacific Railroad Company or on the line of any of its branches, *to be used for a right of way*, or for other railroad purposes, in case the line of said railroad or any of its branches has been or shall be located on or over said described pieces or parcels of land and premises, (being part of the same land granted to the party of the first part by the United States of America under and by virtue of the said Act of Congress, approved the second day of July 1864, and included in the

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[2] Clerk's Papers, at 182.

[3] Brief of Petitioner, at 4. This is consistent with the legal description in the title report dated November 10, 1987. Clerk's Papers, at 255.

> aforesaid mortgage,) together with all and singular, the improvements waters, water courses rights, liberties, privileges, herditaments and appurtenances whatsoever thereunto belonging or in any wise appertaining, and the reversions and remainders, rents issues and profits thereof and all the estate, rights title interest, profits claim and demand whatsoever, of them the parties of the first and second parts in law equity or otherwise, howsoever of in and to the same and every part thereof. . . . [4]

(Italics ours.)

The trial court in its order granting summary judgment[5] and the Court of Appeals in its opinion[6] use the same legal description used by appellant and substantially the same language of the exception. However, the tax deed relied upon by Petitioner Harris identifies the property as "[t]hat portion of the northeast quarter of the northeast quarter of Section 27 township 19 north range 5 east lying southeasterly of Orting-South Prairie Highway Except railroad right of way Easement of record."[7]

Subsequent conveyances of the parcel passed the property from Hiram O. and Ethel E. Sabin to John J. and

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[4] Clerk's Papers, at 182. The language is transcribed from a copy of the original handwritten deed included in the Clerk's Papers, the original of which is on file in volume 5 of Deeds, Pierce County, at 351-54.

[5] Clerk's Papers, at 346.

[6] *Harris v. Ski Park Farms, Inc.*, 62 Wn. App. 371, 814 P.2d 684 (1991).

[7] Clerk's Papers, at 84.

Opel V. Winkelman on May 10, 1946.[8] The warranty deed contained the following legal description:

> [T]he northeast quarter of southeast quarter, and that part of the southeast quarter of northeast quarter of Section Twenty-seven (27), Township Nineteen (19) North, Range Five (5) East of the Willamette Meridian, lying east of the South Prairie Creek:
>
> *EXCEPT the right of way of the Northern Pacific Railway Company* . . . and EXCEPT tracts appropriated by Northern Pacific Railway Company in Cause No. 74807 . . . and Pierce County in . . . Cause No. 44906.[9]

(Italics ours.) Petitioner Harris acquired the property by a tax deed dated December 20, 1983, from the Pierce County Assessor-Treasurer. That deed described the property as:[10]

> Parcel No. 05-19-27-1-006
>
> That portion of the northeast quarter of the northeast quarter of Section 27 township 19 north range 5 east lying southeasterly of Orting-South Prairie Highway Except railroad right of way Easement of record.

Burlington Northern Railroad Company (Burlington Northern) acquired Northern Pacific's interest in the right

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[8] Clerk's Papers, at 200. The record does not indicate intervening conveyances prior to Sabin's conveyance to Winkelman.

[9] Clerk's Papers, at 303.

[10] Clerk's Papers, at 84.

of way.[11] On December 7, 1984, the Interstate Commerce Commission authorized Burlington Northern to abandon the right of way. It was abandoned by Burlington Northern on February 15, 1985,[12] pursuant to 43 U.S.C. § 912, which provides:

> Whenever public lands of the United States have been . . . granted to any railroad company for use as a right of way for its railroad . . . and use and occupancy of said lands for such purposes has ceased . . . by abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by Act of Congress, then and thereupon, all right, title, interest, and estate of the United States in said lands shall, . . . be transferred to and vested in any person . . . to whom . . . title of the United States may have been . . . granted, *conveying or purporting to convey the whole of the legal subdivision or subdivisions traversed or occupied by such railroad . . . without the necessity of any other or further conveyance or assurance of any kind or nature whatsoever. . . .* [13]

At the time of abandonment, Ms. Opel V. Winkelman and the Winkelman Family Trust (Winkelman) held title to the land subject to the right of way. Although Winkelman was not aware that the right of way had been abandoned, pursuant to 43 U.S.C. § 912 title to the right of way vested in Winkelman upon its abandonment.

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[11] Clerk's Papers, at 22. The record does not indicate the date of this acquisition.

[12] Clerk's Papers, at 248.

[13] (Italic ours.) 43 U.S.C. § 912.

On April 23, 1987, Winkelman by real estate contract conveyed 60 acres of the parcel (Lot 6) to Ski Park Farms (Ski Park) for $143,500.[14] On July 24, 1987, Ms. Mary E. Harris (Harris) entered into a purchase and sale agreement with Winkelman for two parcels of the property, one of which was bisected by the right of way. The sale price was $7,000. Ms. Harris prepared the legal description of the property for the purchase and sale agreement, signed by Winkelman, which included the following description:[15]

> All of that portion of tax parcel #05-19-27-1-003 lying between State Route 162 (Pioneer Way) and the South Prairie-Carbon River Road *excepting the Northern Pacific Railroad right-of-way easement.*
>
> All of that portion of tax parcel #05-19-26-2-007 lying between the South Prairie Creek and the South Prairie-Carbon River Road *excepting the Northern Pacific railroad right-of-way easement.*

(Italics ours.)

The sale to Ms. Harris closed on October 29, 1987. The closing documents, including the deed and preliminary title insurance, were reviewed by Ms. Harris and her attorney prior to closing. The statutory warranty deed included the following descriptions:

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[14] Clerk's Papers, at 201. The contract reserved "a 30 foot non-exclusive easement for ingress, egress and utilities. . . . " The document in the file is not signed, but a declaration asserts that the transaction was executed. That assertion is not contested. Clerk's Papers, at 216.

[15] Clerk's Papers, at 245. The document referred to a sketch which was attached.

PARCEL A:

That portion of the West Half of the Northwest quarter of section 26, Township 19, North range 5 East, Willamette Meridian, Pierce County, Washington lying, Southeasterly of South Prairie Creek and Northwesterly of South Prairie-Carbon River County Road, *Excepting there from right of way of the Burlington Northern (Formerly Northern Pacific) Railway Company.*

PARCEL B:

That portion of the Southeast Quarter of the Northeast Quarter of Section 27, Township 19, North Range 5 East of the Willamette Meridian, Pierce County, Washington, which lies Southeasterly of the Southeasterly margin of State Route 162 (Pioneer Way) and northwesterly of South Prairie-Carbon River County Road, *Excepting there from right of way of the Burlington Northern (formerly Northern Pacific) Railway Company.*[16]

Situate in Pierce County, Washington.

SUBJECT TO Easements, Restrictions, Reservations, Conditions, and Provisions of record.

(Italics ours.)

On February 24, 1988, Winkelman by quitclaim deed conveyed its interest in the right of way to Ski Park, reserving to Winkelman "a 30 foot non-exclusive easement for ingress[,] egress and utilities. . . . "[17] The deed conveyed:

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[16] Clerk's Papers, at 207, 255.

[17] Clerk's Papers, at 212-13.

That portion of the Burlington Northern Railroad Company's (formerly Northern Pacific Railway Company) McMillan to Buckley, Washington Branch Line right-of-way, now abandoned, located upon, over and across section 27, Township 19 North Range 5 East, W.M., described as follows:

All that portion of said Railroad Company's 400 foot wide Branch Line right-of-way being 200 feet on each side of said Main Track centerline in the North half of the Southeast quarter of said Section 27, lying Northerly of the West production of the South line of Lot 6 of Survey No. 8701200255, recorded January 2, 1987, and South of the North line of said North half of the Southeast quarter of said Section 27.

Also all that portion of said Railroad Company's 200 foot wide Branch Line right-of-way being 100 feet on each side of said Main Tract centerline in the Southeast quarter of the Northeast quarter of said Section 27, lying North of the south line of said Southeast quarter of the Northeast quarter of said Section 27, and lying South of North line of said Southeast quarter of the Northeast quarter of said Section 27.

Additional Terms and conditions: see schedule A. attached.

. . . .

SCHEDULE A

EASEMENT AND RESERVATION

The sellers herein further RESERVE unto themselves, their heirs, successors and assigns a 30 foot non-exclusive easement for ingress[,] egress and utilities along the South line of which

> is the West Production of the South line of lot 6 of survey No. 8701200255, for the benefit of Lots 4 and 5 of said survey and each and every subdivision thereof.
>
> Said easement may also be conveyed by the sellers herein to each and every lot owner between the Carbon River and the South line of Lot 6 of said survey or any future reciprocal easement agreements.

On March 10, 1988, in a third amended complaint, Petitioner Harris brought an action against Ski Park to quiet title to the right of way property.[18] Ski Park filed a motion for summary judgment and Ms. Harris filed a cross motion for summary judgment to quiet title. On July 5, 1988, Judge E. Albert Morrison, Pierce County Superior Court, denied both motions, concluding that the matter presented factual questions which could not be resolved on summary judgment.[19] Both parties filed motions for reconsideration. On July 22, 1988, the court heard the motions. At that time, counsel for both parties agreed that all material facts in the case were before the court.[20]

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[18] Clerk's Papers, at 135. Petitioner Harris and 39 other plaintiffs (Citizens Against the Trail) initially filed a quiet title action on February 20, 1987. Ski Park was joined as a defendant with an interest in the subject property. Since the claims between Ms. Harris and Ski Park were unlike the claims of the other parties, the trial court bifurcated the action. Only Petitioner Harris is a party before this court. Clerk's Papers, at 173.

[19] Report of Proceedings, at 64.

[20] Report of Proceedings, at 108.

The trial court later on September 7, 1988, granted summary judgment quieting title in Petitioner Harris.[21] The court considered the declarations of several persons. Clark R. McGowan (McGowan), a real estate broker, was Winkelman's representative in the sale. He declared that no verbal or written representation was made to convey the right of way to Harris and that the exception language clearly showed intent not to convey the right of way.[22] McGowan employed John Becker (Becker), a professional land surveyor, to draft the legal description in the deed. Becker declared that Winkelman expressed no intention to reserve a fee interest in the right of way, that the exception language was to recognize that Burlington Northern had and might still have an interest in the right of way, and that if he had been instructed to prepare a deed that reserved a fee interest in the right of way, he would not have used the language that appears in the deed.[23]

The declaration of Winkelman stated that it would not have quitclaimed the right of way to Ski Park if it believed the property had already been conveyed to Ms. Harris and that it did not sell any ownership rights to the right of way property to her.[24] However, Ms. Harris in an unsigned declaration asserted that it was her intention to acquire a fee interest in the property formerly subject to the right of way, and that it was her understanding that she was acquiring the underlying fee in the right of way

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[21] Clerk's Papers, at 344.

[22] Clerk's Papers, at 259.

[23] Clerk's Papers, at 266.

[24] Clerk's Papers, at 216.

from Winkelman.[25] We can give no credence to the declaration because it was not signed and contained the notation "Original to be filed when signature obtained".[26] The record before us does not contain the signed document.

The parties stipulated before the trial court that there were no facts material to resolution of the motions for summary judgment which were not before the court.[27]

On appeal, the Court of Appeals, Division Two, reversed the trial court and quieted title in Ski Park. The court held that in the conveyance to Petitioner Harris, Winkelman intended to "reserve whatever interest in the right of way they owned." The court noted that "[a]lthough not known to Winkelman, the right of way had been abandoned and Winkelman now owned all interest in the property where the right-of-way had previously existed." It further stated that "[i]f the conveyance to Harris was intended to transfer the property where the right of way had existed, the exception language was superfluous."[28] The court concluded that:[29]

> [W]inkelman intended to reserve the property where the abandoned right of way traversed the quarter sections Winkelman conveyed to Harris. The later conveyance from Winkelman to Ski Park vested title to the abandoned right of way property in Ski Park. The

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[25] Clerk's Papers, at 261.

[26] Clerk's Papers, at 265.

[27] Report of Proceedings, at 96, 97, 99, 108.

[28] *Harris v. Ski Park Farms, Inc.*, 62 Wn. App. 371, 377, 814 P.2d 684 (1991).

[29] *Harris*, at 377.

court erred in quieting title to the abandoned right of way property in Harris.

The court then remanded to the trial court with instructions to enter summary judgment quieting title in Ski Park "to that disputed portion of the abandoned right of way property described in Winkelman's quitclaim deed to Ski Park Farms, Inc."

On December 3, 1991, this court granted review.

Petitioner Harris claims that she acquired from Winkelman a fee interest in the right of way. She acknowledges that the 1987 warranty deed from Winkelman to her contains the clause "excepting there from right of way of the Burlington Northern (formerly Northern Pacific) Railway Company." However, she contends that this excepts merely an easement and not the underlying fee interest. She further contends that abandonment of the right of way by Burlington Northern in 1985 by operation of law resulted in her acquisition of the fee interest in the right of way. Ski Park claims a fee interest in the right of way through its 1988 quitclaim deed from Winkelman. It contends that the exception in the warranty deed from Winkelman to Harris excepted a fee interest in the right of way; and that the subsequent quitclaim deed from Winkelman to Ski Park thus gave Ski Park the fee interest in the right of way.

Summary judgment is appropriate "if the pleadings, depositions, . . . together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a

matter of law."[30] A material fact is one upon which the outcome of the litigation depends.[31] The court must consider the facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party and the motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion.[32] On review of summary judgment an appellate court engages in the same inquiry as the trial court.[33]

The term "right of way" may mean a "mere right of passage over a tract, and sometimes to describe the strip of land which railroad companies purchase, or otherwise compulsorily acquire, upon which to construct their railroad."[34] The term "easement" means a "right, distinct from ownership, to use in some way the land of another, without compensation."[35]

"A conveyance of a right-of-way to a railroad may be either in fee simple or may be an easement only."[36] "The interpretation of such a deed to determine its effect is a mixed question of fact and law. It is a factual question to determine the intent of the parties. Then we must apply

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[30] CR 56(c).

[31] *Jacobsen v. State*, 89 Wn.2d 104, 569 P.2d 1152 (1977).

[32] *Wilson v. Steinbach*, 98 Wn.2d 434, 656 P.2d 1030 (1982).

[33] *Marincovich v. Tarabochia*, 114 Wn.2d 271, 787 P.2d 562 (1990).

[34] *Morsbach v. Thurston Cy.*, 152 Wash. 562, 568, 278 P. 686 (1929).

[35] *Olympia v. Palzer*, 107 Wn.2d 225, 229, 728 P.2d 135 (1986).

[36] *Veach v. Culp*, 92 Wn.2d 570, 573, 599 P.2d 526 (1979).

the rules of law to determine the legal consequences of that intent."[37]

This court in *Morsbach v. Thurston County* stated that a railroad right of way is more than an easement.[38] But that statement was clarified in *Swan v. O'Leary*, which stated that the intention of the parties to the conveyance is of paramount importance and must ultimately prevail in a given case.[39] In determining the intent of the parties, courts have considered whether the consideration was substantial or nominal, whether the deed conveyed a strip or tract of land and limited its use to a specific purpose, whether the deed contained a habendum clause, and whether the deed contained a clause providing that if the railroad ceased to operate, the land conveyed would revert to the grantor.[40] When the granting clause of a deed conveys a right of way to a railroad, this court has usually concluded that the deed passes an *easement* and not a *fee with a restricted use*:

> [I]t is clear that we adopted the rule that when the granting clause of a deed declares the purpose of the grant to be a right of way for a railroad the deed passes an easement only, and not a fee with a restricted use, even though the deed is in the usual form to convey a fee title.[41]

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[37] *Veach*, at 573.

[38] *Morsbach v. Thurston Cy.*, 152 Wash. 562, 278 P. 686 (1929).

[39] *Swan v. O'Leary*, 37 Wn.2d 533, 225 P.2d 199 (1950).

[40] *Swan v. O'Leary, supra.*

[41] *Veach v. Culp*, 92 Wn.2d 570, 574, 599 P.2d 526 (1979) (quoting *Swan v. O'Leary, supra*). *See King Cy. v. Squire Inv. Co.*, 59

In *Veach v. Culp*,[42] the court reiterated the "well established principle" that "we must look to the actual use being made of . . . [the] easement in light of the rule that the servient owner retains the use of the easement so long as that use does not materially interfere with the use by the holder of the easement."[43] The plaintiffs in that case sought removal of a chain link fence blocking their access along a railroad right of way which crossed their property. The railroad made minimal use of its track. The court concluded that because of the railroad's limited use of the easement, the plaintiffs, as holders of the subservient estate, were entitled to use the right of way in such a manner that it would not materially interfere with the railroad's use of it.

Both Petitioner Harris and Ski Park agree that this case involves an interpretation of deeds problem. The interpretation of a right of way deed is a mixed question of fact and law.[44] A court should construe a deed grant in a manner which gives effect to the intent of the parties.[45] The intent of the parties is to be derived from the entire instrument and, if ambiguity exists, the situation and circumstances of the parties at the time of the grant are to be considered.[46]

Wn. App. 888, 801 P.2d 1022 (1990) (Washington cases show a strong tendency to consider such rights of way as easements).

[42] 92 Wn.2d 570, 599 P.2d 526 (1979).

[43] *Veach*, at 575.

[44] *Veach v. Culp, supra; Roeder Co. v. Burlington Northern, Inc.*, 105 Wn.2d 567, 716 P.2d 855 (1986).

[45] *Zobrist v. Culp*, 95 Wn.2d 556, 627 P.2d 1308 (1981).

[46] *Zobrist*.

Since both Harris and Ski Park filed motions for summary judgment, the facts must be reviewed in the light most favorable to the nonmoving party in considering each motion.

I

Ski Park Motion For Summary Judgment

Ski Park argues that in the grant from Winkelman to Ms. Harris, it was the parties' intent to except a fee interest in the right of way and not merely an easement and that Winkelman therefore subsequently quitclaimed to Ski Park a fee interest in the right of way. In support of its position, Ski Park argues (1) that the terms "excepting" and "right of way" except a fee interest, (2) that because Winkelmman owned the right of way in fee at the time of the grant to Ms. Harris, the deed excepted a fee interest, and (3) that the doctrine of merger prevents use of the purchase and sale agreement to interpret an ambiguity in the deed.

Ski Park cites an early case to define the term "exception" as a "clause in a deed which withdraws from its operation some part of the thing granted, and which would otherwise have passed to the grantee under the general description [and] [t]he part excepted is in existence at the time of the grant, and remains . . . unaffected by the conveyance."[47] Using this definition, it argues that use of the term "excepting" necessarily prevents the

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[47] *Biles v. Tacoma, O. & G.H.R.R.*, 5 Wash. 509, 32 P. 211 (1893). *See also Studebaker v. Beek*, 83 Wash. 260, 265, 145 P. 225 (1915).

grantee, Ms. Harris, from obtaining the entire fee interest in the property conveyed because Northern Pacific reserved a right of way, within its ordinary meaning, and because, before signing, Ms. Harris and her attorney reviewed the closing documents which made no reference to an easement.

An easement is a burden on the land and an interest in land.[48] The term "excepting" arguably could have been used by the parties to express their understanding that, although Ms. Harris was receiving a fee interest, her rights were not plenary, but subject to an easement. This would be consistent with Ms. Harris' assertion that she thought the deed was excepting only an easement and that she was in fact acquiring the underlying fee to the railroad right of way, but this assertion is not properly before us.[49]

The deed from Northern Pacific to Wilkeson did not explicitly reserve a fee. The right of way thus arguably could be considered as either a fee interest or simply an easement. The deed description of the right of way ("a strip of land two hundred feet wide") and its purpose ("to be used for a right of way, or for other railroad purposes") would ordinarily create an easement only and not a fee simple interest.[50] This is inconsistent with Ski Park's arguments that Northern Pacific reserved a fee and

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[48] *Kesinger v. Logan*, 113 Wn.2d 320, 779 P.2d 263 (1989) (an easement is an interest in land within the purview of the conveyance statute).

[49] Clerk's Papers, at 265. We cannot consider this assertion because it is contained only in an unsigned declaration.

[50] *Veach*, at 574.

that the common meaning of a right of way is a fee interest. Similarly, the fact that Ms. Harris and her attorney reviewed the closing documents and did not object to lack of reference to an easement does not necessarily support Ski Park's conclusion that a fee was excepted. Further, the deed was prepared by Winkelman's agent. Becker, who stated that if he had been instructed to reserve a fee interest, he would not have used the language used in the deed. This assertion, of course, is speculation and cannot of itself be used to establish the intent of Winkelman.

Burlington Northern abandoned the right of way in 1985, 2 years prior to Winkelman's conveyance to Ms. Harris. Ski Park argues that if the exception clause is interpreted as withholding only an easement, nothing would be withheld because the right of way no longer existed and Winkelman held the entire parcel in fee at the time it conveyed to Harris. The Court of Appeals, in granting summary judgment in favor of Ski Park, also focused on abandonment of the right of way. The Court of Appeals concluded that since the right of way was no longer in existence. Winkelman intended to reserve in fee the property where the right of way once existed. The court stated that its conclusion as to Winkelman's intent was necessary because to hold otherwise would make the exception language "superfluous". However, that language would be superfluous only if Winkelman intended to except an easement knowing that an easement no longer existed. Since Winkelman did not know of the abandonment (and the resulting fee interest), it cannot be said with certainty that it intended to reserve the fee interest in the right of way. This court has held that the

intent of the parties must prevail. The real estate contract between Winkelman and Ski Park dated April 23, 1987, which antedates the October 29, 1987, statutory warranty deed to Petitioner Harris, at least provides some support to a conclusion that Winkelman intended to reserve a fee interest in the railroad right of way, notwithstanding the confusion created by the language in the purchase and sale agreement prepared by Petitioner Harris.

Ski Park finally argues that, under the doctrine of merger, the purchase and sale agreement merged into the deed. The trial court, in granting summary judgment in favor of Ms. Harris, relied on the language of the purchase and sale agreement. However, the Court of Appeals held that the purchase and sale agreement was not controlling because it merged into the deed. Both Ski Park and the Court of Appeals rely on *Black v. Evergreen Land Developers*.[51] However, that case recognized that there were exceptions to the merger doctrine. This court has held that where the intent of the parties is not clearly expressed in the deed, courts may consider parol evidence.[52] In order to determine the intent of the parties, extrinsic evidence is admissible as to the entire circumstances under which a contract is made.[53]

This court has adopted the "context rule" which succinctly stated is that "extrinsic evidence is admissible as to the entire circumstances under which [a] contract [is]

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[51] 75 Wn.2d 241, 450 P.2d 470 (1969).

[52] *Roeder Co. v. Burlington Northern, Inc.*, 105 Wn.2d 269, 714 P.2d 1170 (1986).

[53] *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990).

made, as an aid in ascertaining the parties' intent", specifically adopting the Restatement (Second) of Contracts §§ 212, 214(c) (1981).[54]

This court in *Berg v. Hudesman*[55] rejected "the theory that ambiguity in the meaning of the contract language must exist before evidence of the surrounding circumstances is admissible" and overruled cases to the contrary.[56]

The purchase and sale agreement in this case may be considered as some evidence of the circumstances of the parties at the time of the grant. Even considering, in the light most favorable to Ms. Harris, that both Winkelman and Harris signed the purchase and sale agreement, a conclusion that the parties intended to except only an easement and not a fee interest ("excepting the Northern Pacific railroad right of way easement") is tenuous, at best.

Applying the rules on summary judgment, the undisputed facts in this case and the law favor summary judgment for Respondent Ski Park Farms.

II

Harris Motion For Summary Judgment

Petitioner Harris' position is that the deed excepted only an easement and since the easement was extinguished by the abandonment, she acquired a fee interest

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[54] *Bert*, at 667, 668.

[55] 115 Wn.2d 657, 801 P.2d 222 (1990).

[56] *Berg*, at 669.

in the entire parcel. She argues that the parties intended to except an easement and not a fee interest in the right of way and that an ambiguous deed should be interpreted in favor of the grantee. She further contends that the Court of Appeals erred in granting summary judgment in favor of Ski Park by concluding that the right of way had been abandoned when Winkelman did not even know of the abandonment at the time it granted the property to her.

To support her position that the parties intended to except an easement, petitioner argues that she used the term "easement" in the purchase and sale agreement, which was signed by Winkelman; that the phrase "railroad right of way" historically reserved an easement; and the language in the deed reflects the historical interpretation of the phrase. She further argues that her quiet title action was known to Winkelman and that was evidence that both parties knew that Harris intended to acquire the fee interest in the right of way. She also claims that because Winkelman did not know of abandonment of the right of way by the railroad, it could not have intended to except a fee interest it did not know it had. Any facts relating to the intent of the parties must be obtained from sources other than Petitioner Harris. Her declaration is unsigned and cannot be considered on the record before us.

Use of the term "easement" in the purchase and sale agreement and the historical interpretation of the phrase "railroad right of way" may provide some indication of Ms. Harris' intent to except only an easement, but it does not lead to the same conclusion on Winkelman's intent. Winkelman has stated that it did not intend to transfer

any ownership rights in the right of way to Ms. Harris. If Winkelman knew of her quiet title action, it may indicate some knowledge that Ms. Harris wanted a fee interest, but it does not indicate Winkelman's intent to convey a fee interest. McGowan, seller Winkelman's agent, stated that the sellers gave no indication of an intent to convey the right of way to Ms. Harris at closing or at any time in the future. Although Winkelman did not know the right of way had been abandoned and that it now held reversionary title to it, it meant to reserve under the exception whatever interest it had. Winkelman stated that its understanding of the exception language was that it excepted conveyance of the right of way regardless whether it was an easement or a fee interest. Therefore, viewing the facts in the light most favorable to Ski park, it cannot be said that the one conclusion reasonable persons could reach is that the parties intended to convey only an easement and not a fee interest.

Petitioner Harris argues that the deed should be construed in favor of the grantee. She states that the facts supporting her contention are that the deed was prepared by Becker, grantor Winkelman's agent; that Becker stated that he was not told to withhold the fee in the conveyance; and Becker stated that if he had been so instructed, he would have used language different from that used in the deed.

While ambiguity in a deed is resolved against the grantor,[57] the intent of the parties is of paramount importance.[58] The statutory warranty deed dated October 29, 1987, is not ambiguous. Any ambiguity is created by the language of the July 24, 1987 purchase and sale agreement. Winkelman stated that it did not intend to sell any ownership rights in the right of way. Viewing this fact in the light most favorable to Ski Park, it is reasonable to conclude that Winkelman intended to except a fee interest in the property and not merely an easement.

Petitioner Harris further argues that because neither party knew the status of the right of way, there was no intent to act as if the right of way had been extinguished and held in fee by Winkelman. However, on the record in this case, Ms. Harris could have known that the right of way was held by Winkelman in fee. Ms. Harris initiated a quiet title action in February 1987, 8 months prior to closing her purchase from Winkelman. In her complaint, she acknowledged that Burlington Northern abandoned the right of way in 1985 and that upon abandonment, the right of way immediately vested in the original grantors or their successors. One may infer that she knew Winkelman held a fee interest in the right of way and she nevertheless agreed to the exception. Petitioner contends that Burlington Northern's claim to the right of way was unsettled at the time of the conveyance. The only support for her contention is a letter she received from the Pierce County Prosecuting Attorney in January 1987 which

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[57] *Kunkel v. Meridian Oil, Inc.*, 114 Wn.2d 896, 901, 792 P.2d 1254 (1990).

[58] *Swan*, at 535.

advised her that Burlington Northern had not abandoned its claim to ownership to the property. Although there is no clear evidence that she had actual knowledge of ownership, she might logically have insisted that Winkelman quitclaim the right of way to her if she intended to acquire the fee interest in the right of way. This she did not do. As to Winkelman's intent, it stated that it would not have quitclaimed the right of way to Ski Park if it believed that it had already conveyed the property to Ms. Harris. Subsequent acts of a party to a contract are admissible to assist in ascertaining intent.[59] Winkelman's subsequent quitclaim of the right of way to Ski Park, and its prior sale by real estate contract, is consistent with its intent to convey only an easement to Petitioner Harris.

We agree with the Court of Appeals that the trial court erred in granting summary judgment quieting title in Petitioner Harris and that summary judgment should be granted in favor of Respondent Ski Park Farms, Inc., quieting title in it.

From the record in this case, we conclude that the reservation and exception granting a right of way to the Northern Pacific Railroad reserved and excepted a fee interest in the property; and that abandonment of the right of way by the railroad resulted in reversion to the owner of the property (Winkelman), who conveyed by statutory warranty deed a portion of the acreage to Petitioner Harris, reserving a fee interest in the railroad right of way, and conveying the remainder of its property

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[59] *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 510 P.2d 221 (1973).

interest by quitclaim deed to Respondent Ski Park Farms, Inc.

We affirm the Court of Appeals and remand the case to the trial court for entry of Summary judgment and quiet title in favor of Respondent Ski Park Farms, Inc.

/s/ Smith, J.

WE CONCUR:

/s/ Dore, C.J.

/s/ Utter, J.

/s/ Brachtenback, J.
concurs in result only

/s/ Dolliver, J.

/s/ Andersen, L.
concurs in result

/s/ Durham, J.

/s/ Guy, J.

/s/ Johnson, J.

APPENDIX B

No. 12321-5

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON, DIVISION II

MARY E. HARRIS

Respondent,

v.

SKI PARK FARMS, INC.

Appellant.

BRIEF OF RESPONDENT

(Filed April 24, 1989)

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I. – RESPONSE TO ASSIGNMENT OF ERROR AND ISSUES

The Appellant, Ski Park Farms, Inc., (hereinafter "Ski Park") has assigned error to the trial court's order granting partial summary judgment to the Respondent, Mary

E. Harris (hereinafter "Harris") and ruling as a matter of law that the deed from Ski Park's predecessor in title to Harris excepted an easement from the terms of the conveyance.

Harris respectfully submits that the following are the issues presented by Ski Park's assignment of error:

1. The parties stipulated that the court had before it all of the facts that could be presented at trial, that there were no genuine issues of material fact, and that the matter was appropriate for summary judgment. Does the stipulation of the parties limit the scope of this review to errors of law?

2. The trial court determined that the deed to Harris was ambiguous and found that the parties to the deed intended to except an easement in favor of the railroad. Was the trial court's determination and finding supported by substantial evidence, the stipulated facts and principles of deed construction.

II. – STATEMENT OF THE CASE

A. Factual Background

This case arises out of the sale of real property from Opal Winkelman, Joan Nelson, Mary Eytinge and the Winkelman family trust (hereinafter "Winkelman") to Harris. The disputed property consists of a parcel between 140 and 200 feet wide and approximately 1400 feet long and is situated between two highways. A diagram of the property included within the terms of the sale is attached hereto and incorporated by this reference as "Exhibit A". There were not three small parcels as Ski

Park asserts but two parcels: one in Section 27 and one in Section 26. The property in question was formerly subject to a right-of-way for railroad purposes in favor of Burlington Northern Railroad as successor in interest to the Northern Pacific Railroad (C.P. 225-258).

Winkelman acquired its interest in the disputed property by warranty deed in 1946 from Sabin (C.P. 241). The deed from Sabin to Winkelman contained the following language: "except the right-of-way of the Northern Pacific Railway Company".

In July, 1987, Harris entered into an Earnest Money Purchase and Sale Agreement with Winkelman to buy the following described real property in Pierce County:

> All of that portion of tax parcel number 5-19-27-1-003 lying between State Route 162 (Pioneer Way) and the South Prairie-Carbon River Road *excepting the Northern Pacific Railroad right-of-way easement.*
>
> All of that of portion tax parcel 5-19-26-2-007 lying between South Prairie Creek and the South Prairie-Carbon River Road *excepting the Northern Pacific Railroad right-of-way easement.* (C.P.243, 244 and 245, emphasis supplied)

Winkelman was represented in this transaction by Clark McGowan, a real estate broker. When Harris initially contacted Winkelman she was told that they did not want to be personally involved in the transaction and that she should deal with McGowan (C.P. 262).

A preliminary title report was issued at the seller's order (C.P. 253). The report disclosed two relevant exceptions. One was a Lis Pendens filed by Harris including

the disputed property (see exception number one). The other was of continuing interests of the railroad in the disputed property (see exception number five).

On October 29, 1987, pursuant to the Earnest Money Purchase and Sale Agreement, Winkelman delivered a Statutory Warranty Deed to Harris. Harris paid $7,000.00 for the following described real property:

> Parcel A: That portion of the west half of the northwest quarter of Section 26, Township 19 North, Range 5 East of the W.M., Pierce County, Washington, lying southeasterly of South Prairie Creek and northwesterly of South Prairie-Carbon River County Road, *excepting therefrom right-of-way of the Burlington Northern (formerly Northern Pacific) Railway Company.*
>
> Parcel B: That portion of the southeast quarter of the northeast quarter of Section 27, Township 19 North, Range 5 East of the W.M., Pierce County, Washington, which lies southeasterly of the southeasterly margin of State Route 162 (Pioneer Way) and northwesterly of South Prairie Carbon River County Road, *excepting therefrom right-of-way of the Burlington Northern (formerly Northern Pacific) Railway Company.* Situate in Pierce County, Washington. (C.P. 246, emphasis supplied).

The legal description included in the deed was prepared at Winkelman's order by John Becker, a licensed surveyor (C.P. at 266 and 268). Mr. Becker was not instructed to except a fee interest in the property underlying a former railroad right-of-way from the terms of the conveyance. Had he been so instructed he would have used other language (C.P. at 267).

The former railroad right-of-way was abandoned by the Burlington Northern Railroad prior to the sale to Harris (R.P. 30). At the time of the conveyance to Harris, however, Winkelman did not know that there was an abandonment or that they owned any interest in the disputed property (Brief of Appellant at 18). Harris knew that the ICC had authorized the abandonment at the time of the sale. She attempted to determine the significance of this authorization by correspondence with the ICC and Pierce County (C.P. 247-250). Harris discussed the railroad's interest in the disputed property with McGowan on several occasions before the closing of the sale (C.P. 263).

On February 24, 1988, Ski Park paid Winkelman $250.00 for a Quit Claim Deed purporting to convey Winkelman's interest in the disputed property and in other property formerly subject to a railroad right-of-way.

The Quit Claim Deed of February 24, 1988, is the sole basis upon which Ski Park asserts title to the disputed property (C.P. 181-213, C.P. 276, and Brief of Appellant).

B. Procedural Background

Harris filed a complaint to quiet title to property formerly subject to a railroad right-of-way on February 27, 1987 (C.P. 1-96). On September 11, 1987, Harris amended her complaint to include claims to the disputed property and recorded a Lis Pendens disclosing this action under #8709110334 (C.P. 251).

Ski Park brought a Motion for Summary Judgment to quiet title to the property described in the February 24,

1988 Quit Claim Deed. Harris filed a Cross-Motion for Summary Judgment to that property formerly subject to a railroad right-of-way in the southeast of the northeast of Section 27, Township 19 North, Range 5 East of the W.M. as conveyed to her by Winkelman in the October 29, 1987 Warranty Deed.

On July 5, 1988, Judge Morrison of the Pierce County Superior Court denied both Motions for Summary Judgment and ruled that the matter presented factual questions inappropriate for resolution at summary judgment (R.P. 63-64). Ski Park filed a motion for reconsideration of the court's ruling. Harris subsequently filed a similar motion. The court heard these motions on July 22, 1988. At that time counsel for both parties stipulated that there were no genuine issues of material fact and that the court had before it all facts that might be presented at trial (R.P. 96-108). Based upon this stipulation the court granted Harris's motion and quieted title in the disputed property to Harris. Ski Park filed a further motion for reconsideration of the court's decision on August 17, 1988. This motion was denied (C.P. at 317-319). On September 7, 1988, the court entered written Findings of Fact and Conclusions of Law in support of a judgment quieting title to the disputed property in favor of Harris. Ski Park's appeal followed that judgment.

III. – SUMMARY OF ARGUMENT

The parties stipulated in open court that there were no facts in dispute and that all facts that could be presented at trial were then before the court. Based on this stipulation the court ruled in favor of Harris as a matter

of law. Therefore the function of the appellate court is to ascertain whether the Findings of Fact support the Conclusions of Law entered by the lower court. The appellate court should not to engage in a de novo inquiry into the facts.

The court found that the legal description of the October 29, 1987 deed to Harris was ambiguous with respect to the meaning of the clause excepting therefrom right-of-way. The court looked beyond the four corners of the deed to determine the intent of the parties. The court focused on the legal description attached to the Earnest Money Purchase and Sale Agreement as the best evidence of the intent of the parties to except only an easement from the terms of the conveyance and quieted title to Harris. This conclusion was supported by substantial evidence in the record and should not be disturbed on appeal.

IV. – LAW AND ARGUMENT

A. The Parties Stipulated That the Facts Were Not in Dispute

Ordinarily, an appellate court reviewing an order granting summary judgment will engage in the same inquiry as the trial court. This involves a determination of whether there are any genuine issues of material fact that would render the case inappropriate for summary judgment. If no issue of fact is found the court views the facts in the light most favorable to the non-moving party and determines whether judgment is proper as a matter of law. *Reese v. Sears*, 107 Wn.2d 563, 731 P.2d 497 (1987). In these situations the appellate court will generally regard

any Findings of Fact and Conclusions of Law entered by the lower court as surplusage. *Duckworth v. Bonney Lake*, 91 Wn.2d 19, 586 P.2d 680 (1978). In this case, however, the parties stipulated that there were no disputed issues of fact, and that the court had all the facts before it that could be presented at trial and twice moved for a summary resolution of the case. Under these circumstances it is appropriate for the appellate court to determine whether, given the stipulated facts presented to the lower court, the courts decision was supported in law. *Morgan v. Prudential Insurance Co.*, 86 Wn.2d 432, 545 P.2d 1193 (1976).

B. The Stipulation of the Parties is Binding.

Civil Rule 2A is the rule governing the binding effect of oral stipulations. The rule provides that an oral stipulation is binding when made and assented to in open court before a court reporter. The transcript of the hearing before Judge Morrison on July 22, 1988, includes the following:

> COURT: Is there any factual data that would be presented at the trial of this case that is not now before this Court? (R.P. 96)
>
> GAUTHIER (for Ski Park): [No] other than just additional verbiage on the same issues. (R.P. 96)
>
> COURT: Do you think there are any facts that are material to the resolution of this issue that are not now before this Court?
>
> COMBS (for Harris): No I do not your honor. (R.P. 97)
>
> COURT: Anything further?

> GAUTHIER: Your honor I would agree that, you know, the facts are not in dispute . . . the facts before the court, you know, are very clearly what the understandings of the parties were . . . and those would be the facts, your honor, that the case should be decided. (R.P. 99)
>
> COURT: Now I have relied upon the representations of both counsel that all the material facts in this case are before the Court or I would not have decided the case on summary judgment. (R.P. 108)

The above-language satisfies the requirements of CR2A for oral stipulations. Stipulations and agreements of counsel are viewed with favor. *Smythe & Worldwide Movers, Inc. v. Whitney,* 6 Wn.App 176, 491 P.2d 1356 (1971). When the parties have knowingly entered into stipulations, a trial court's reliance upon the stipulation will not be disturbed on appeal. *Baird v. Baird,* 6 Wn.App 587, 444 P.2d 1387 (1972).

In the present case, there is an element that changes the scope of inquiry. Instead of mere allegations that the facts were not in dispute there is a binding agreement to that effect. Stipulations to facts in a summary judgment motion are binding on the parties for the purposes of subsequent proceedings. *Woods v. Gott,* (U.S.D.C. Del. 1950) 92 F.Supp 325.

It is important to emphasize that the lower court first denied both parties' motions for summary judgment (R.P. 56). The court only consented to decide the case without trial after both sides stipulated in open court that all facts were before the court and not in dispute. The parties may not now argue that the matter was inappropriate for

summary judgment and this court should limit the scope of review to errors of law.

C. The Findings of Fact and Conclusions of Law.

Because this matter was decided after the parties stipulated to facts the function of the appellate court is to apply the facts as found below and determine whether those facts support the conclusions of law entered by the court. *See: Morgan v. Prudential Insurance Co., supra.* It is important to review exactly what the lower court decided. The court found:

1. That the language of exception of the right-of-way in the warranty deed from Winkelman to Harris was ambiguous with respect to the nature of the property interest excepted from the terms of the deed. *Finding of Fact,* 1.14. (C.P. 349).

2. That the legal description of the Earnest Money Purchase and Sale Agreement disclosed the mutual intent of the parties that only an easement was excepted from the conveyance if any easement then existed. *Findings of Fact,* 1.10, 1.11 and 1.15 (C.P. 349 and 350).

3. That the ambiguous language of the deed was interpreted to include the conveyance of the underlying fee of certain land formerly subject to a railroad right-of-way. *Findings of Fact,* 1.20 (C.P. 350).

The court based its interpretation of the deed language upon, and found evidence of the parties intent in, the language of the legal description attached to and made part of the Earnest Money Purchase and Sale Agreement of July 24, 1987. The court did not reform the

deed but merely interpreted ambiguous language. *Conclusion of Law,* 2.6, (C.P. 352).

D. This Case is Controlled by Principles of Deed Construction.

Despite the many complex legal arguments raised by both sides in this controversy, in the final analysis the dispute boils down to a simple matter of deed construction. Construction of deeds is a matter of law for the court. *Thomas v. Nelson,* 35 Wn.App 868, 670 P.2d 682 (1983) and *State Bank v. Phillips,* 11 Wn.2d 483, 119 P.2d 664 (1941). In construing a deed a court must carry out the real intent of the parties and give meaning to each word of the deed if reasonably possible. Where a deed may be construed in more than one way it must be interpreted most favorably to the grantee and most strictly against the grantor. *Hodgins v. State,* 9 Wn.App 486, 513 P.2d 304 (1973) and *Carr v. B.N.R.R.,* 23 Wn.App 386, 597 P.2d 409 (1979). The duty of the court is to ascertain not what the parties may have secretly intended, but rather, the meaning of the words used. The court must find the true sense of the written words as the parties used them and then subject the instrument, in its operation, to established rules of law. *Vavrek v. Parks,* 6 Wn.App 684, 495 P.2d 1051 (1972).

In this case the court found that the deed was capable of more than one construction and that the language of the legal description was ambiguous (R.P. 103). The rule in Washington is that if an ambiguity is found, the situation and circumstances of the parties existing at the time of the grant are to be considered. *Zobrist v. Culp,* 95

Wn.2d 556, 627 P.2d 1308 (1981). To ascertain the intention of the parties, separate deeds or instruments executed as parts of substantially one transaction may be taken together and construed as one instrument. *Standring v. Mooney,* 14 Wn.2d 220, 127 P.2d 401 (1942). If two documents relating to the sale of real property are part of the same transaction they should be construed together in determining the intention of the parties. Parol evidence is admissable to show the intent of the parties when an instrument contains an ambiguity and to show the circumstances under which instruments were executed. *Lemen v. Pring Corp.,* 4 Wn.App 462, 482 P.2d 802 (1971).

E. Substantial Evidence Supports the Lower Court's Decision

1. The Exception language Was Ambiguous.

Blacks Law Dictionary defines ambiguous language as that which is reasonably capable of being understood in more than one sense. The parties agree and have cited considerable authority from this and other jurisdictions that the clause "excepting therefrom right-of-way" has more than one reasonably understood meaning. (*See*: Brief of Appellant; *and see*: Plaintiff's Memorandum in Support of Cross-Motion for Summary Judgment C.P. 225-228).

Harris maintains the language refers to easement rights of the railroad. Ski Park contends that the language was intended to except a fee interest. The court found that Harris's interpretation of the language was the more appropriate one because the legal description in the Earnest Money Purchase and Sale Agreement contained the

words "excepting the right-of-way easement" (R.P 103-104). The court found that Winkelman acknowledged this description and that there was no evidence to support a modification of the understanding of the parties found in the Earnest Money Purchase and Sale Agreement (R.P. 104).

2. The Merger Doctrine is Inapplicable.

In general, the merger doctrine provides that a deed made in full execution of a contract of sale of land merges the provisions of the contract into the deed, including all prior negotiations leading up to the execution of the deed. The rule is subject to the exception that the question of merger is one of construction to be gathered from a consideration of the instruments. *Davis v. Lee,* 52 Wn. 330, 100 P. 752 (1909) and *Black v. Evergreen Land Developers,* 75 Wn.2d 241, 450 P.2d 470 (1969).

Ski Park's argument for the application of the merger doctrine must fail. The court did not rule that the Earnest Money Purchase and Sale Agreement superseded the deed, as Ski Park contends. The language of the deed was admittedly capable of more than one interpretation. The court simply found evidence of the parties' intended meaning and applied it to interpret the ambiguous deed.

The legal description in the Earnest Money Purchase and Sale Agreement is not inconsistent with the description in the Warranty Deed. The two documents are not mutually exclusive. The former document serves to explain, interpret and construe the latter.

3. The Earnest Money Purchase and Sale Agreement Disclosed the Mutual Intent of the Parties That Only an Easement Was Excepted.

Harris's intent to exclude an easement was found in several ways: (a) She used the word easement in the legal description; (b) She filed a Lis Pendens including the disputed property, thus providing actual or constructive notice to the seller that she intended to acquire the property. (*See*: Harris Declaration and Title Report, C.P. 261-265, C.P. 252 and R.P. 129-131); and (c) She discussed the former right-of-way with the seller's agent (Harris Declaration, C.P. 263).

Support for Winkelman's intent to exclude only an easement was found as follows: (a) Winkelman signed and approved the legal description in the Earnest Money Purchase and Sale Agreement (containing the word "easement") (C.P. 242-244); (b) Winkelman never directed their agent, the surveyor John Becker, to except the underlying fee from the terms of the conveyance. Had he been so instructed he would have used different language (R.P. 102-103 and Becker Declaration, C.P. 266-268); (c) Winkelman did not know that the former right-of-way had been abandoned or that they owned any interest in the former right-of-way at the time of the sale. (*See*: Brief of Appellant at 18) One cannot intend to except or reserve what one does not know one owns; and (d) The language of exception in the Warranty Deed to Harris is consistent with language of exception in prior conveyances within the chain of title. (C.P. 226 and 238-241) If, as Ski Park contends, the language of exception in the deed from Sabin to Winkelman did not except a fee interest, then

virtually identical language in the Winkelman to Harris deed did not do so either.

4. The Trial Court Did Not Reform the Deed.

Ski Park argues that the trial court reformed the deed by adding the word "easement" (Brief of Appellant at 25). The court was very clear that it did not reform any documents but simply interpreted ambiguous language (R.P. 117 and 118). The court based its interpretation of the ambiguity on the absence of any evidence of intent to modify the terms of the Earnest Money Purchase and Sale Agreement. (R.P. 104; and *see*: Earnest Money Purchase and Sale Agreement, Paragraph 18, C.P. 243 "All modifications shall be in writing.") The Earnest Money Purchase and Sale Agreement and the Warranty Deed are clearly documents relating to the sale of real property and are part of the same transaction. By its terms the Earnest Money Purchase and Sale Agreement contemplates the deed. The law in Washington supports the court's action in construing the two documents together in order to determine the intention of the parties. *Standring v. Mooney, supra,* and *Lemen v. Pring, supra.*

F. All of the Evidence Contemporaneous to the Sale Supports the Lower Court's Interpretation.

Ski Park argues that the parties could not have intended to except an easement because no easement existed at the time of the conveyance (*See*: Brief of Appellant, at 9). While it is agreed that Winkelman owned the fee interest in the property formerly subject to a railroad

right-of-way, the parties did not know that at the time of the sale. Ski Park acknowledges this (*See*: Brief of Appellant at 18). The title report, ordered by Winkelman, disclosed that the railroad apparently had continuing rights in the property at the time of the sale (*See*: Exception 5 in Title Report, C.P. 252). The railroad was paying real property taxes on the disputed property at that time (R.P. 97). The railroad was still a party defendant in the quiet title action involving the property and did not disclaim its interest until December, 1987. The court found that "[Winkelman] would not want to warrant title to the fee without excepting the easement even though they had some reason to believe that the easement may well be or have been abandoned" (R.P. 103).

Ski Park now argues that Winkelman intended something other than the exception of an easement. Under deed construction principles, however, the duty of the court is to ascertain not what the parties may have secretly intended but what is the meaning of the words used. *Vavrek v. Parks, supra.* This is what Judge Morrison did and his conclusion is supported by the evidence and stipulated facts before him.

G. The Lower Court's Interpretation of the Deed Does Not Render the Deed Exception Meaningless.

Ski Park argues that the lower court's interpretation is meaningless because the deed exception was intended to withhold some interest. Harris agrees that something was withheld, namely whatever rights the railroad might still have in the property. The title report contained an

exception for continuing interests of the railroad and the railroad still claimed an interest in the property. Although the railroad later turned out not to have any interest in the property this does not change the fact that the parties reasonably believed otherwise at the time of the conveyance.

H. The Lower Court's Interpretation of the Exception Does Not Render the Clause Nonsensical

Ski Park's contention is that the lower court's interpretation is nonsensical because the railroad had always owned the land in fee. This is not true. Ski Park refers to decisions describing the interest held by a railroad in right-of-way land pursuant to the Northern Pacific Land Grant Act of 1864, ch. 217, 13 Stat. 365 (1864) as a limited fee on an implied condition of reverter (*See*: Defendant's Memo in Support of Motion for Summary Judgment, C.P. 181-213). The limited fee designation was applied to land acquired pursuant to Section 2 of the Northern Pacific Land Grant Act of 1864. But here, the railroad acquired its interest pursuant to Section 3 of the 1864 Act (*See*: Page 2 of Plaintiff's Memorandum in Support of Motion for Summary Judgment, C.P. 226).

Pursuant to the Act of 1864, when the railroad selected land under Section 3, as here, it acquired fee simple title to the entire subdivision. *See: H.A. & L.D. Holland Co. v. N.P.R.R.*, (9th Circuit 1914) 214 F. 920.

After obtaining fee title N.P.R.R. conveyed the subdivision here in question to Samuel Wilkeson in 1876. The conveyance to Wilkeson contained a reservation and exception of "a strip of land 200 feet wide . . . to be used

for a right-of-way or for other railroad purposes" (C.P. 238-240). Washington courts have construed this type of deed language to reserve and except only an easement in favor of the railroad that terminates upon abandonment. *Swan v. O'Leary,* 37 Wn.2d 533, 255 P.2d 199 (1950) and *Lawson v. State,* 107 Wn.2d 444, 730 P.2d 1308 (1986). Therefore following the conveyance to Wilkeson in 1876, all the railroad had left was an easement for railroad purposes. The lower court's interpretation not only makes sense, but more accurately reflects the interest that the railroad had in the disputed property.

I. The Fact That Other Deed Language Could Have Been Used Supports the Lower Court's Interpretation

Ski Park argues that it would have been possible to draft language more clearly defining what the parties meant by the words "excepting therefrom right-of-way". It was Winkelman's agent, however, who prepared the problematic language. If Winkelman intended to except a fee interest they could have said so. As the court pointed out "if [different language was used] there would not be an issue in this case. There would be no ambiguity" (R.P. 104). The deed language must be construed most strictly against the grantor (Winkelman) and in favor of the grantee (Harris). *See: Carr v. B.N.R.R., supra.*

Harris did not take a deed excepting the very property she intended to acquire, as Ski Park maintains. She took a deed that recognized the possibility of a continuing interest in the railroad. Ski Park's analogy to "keys in a pocket" is inappropriate because the word "keys" only

has one commonly understood meaning (Brief of Appellants at 13). The words "right-of-way" have several. Ski Park ignores the question of the intent of the parties that has lead to this litigation.

J. The Lower Court's Interpretation is not Inconsistent With the Term "Excepting" in the Deed.

Ski Park argues that exception language is used only when the interest withheld existed at the time of the deed. The language in the deed was "excepting therefrom right-of-way *of the Burlington Northern Railroad*" (emphasis supplied). The railroad had abandoned the former right-of-way at the time of the conveyance. Therefore no right-of-way of the Burlington Northern Railroad existed on the date of the conveyance, whether the railroad's interest was formerly fee or easement. The problem here was that the parties did not know the nature of the railroad's interest or that it was extinguished at the time of the conveyance (Brief of Appellant at 18). If the railroad had any interest in the disputed property, the exception language in the deed was effective to recognize that interest.

V. CONCLUSION

This case presents a classic deed interpretation/construction problem. The question before the lower court was the intent of the parties to the October 29, 1987 deed to Harris in using the words "excepting therefrom right-of-way of the Burlington Northern Railroad". The parties to this appeal agree that there is ample authority that the quoted language alone might have been effective to

except an easement or a fee. Their acknowledgment establishes that the lower court correctly ruled that the deed was ambiguous. The ambiguous deed language must be construed most favorably to the grantee and against the grantor.

The parties stipulated that all of the facts that could be presented at trial were before the court and were not in dispute. Based upon the stipulated facts the court found that an exception of an easement was intended. The court's finding was supported by substantial evidence. The key evidence was the language of the Earnest Money Purchase and Sale Agreement which contained the clause "excepting the B.N.R.R. easement".

Ski Park has sought to cloud the issue with irrelevant and specious arguments. Ski Park urges the court to consider Harris's membership in an organization opposed to the establishment of a recreational trail as dispositive of some legal issue involved in this case. That argument is clearly without merit.

All of the equities in this case support the lower court's decision. Harris disclosed her intent to acquire the underlying fee to the disputed property. The sellers employed a real estate broker, land surveyor and title company to represent them. None of those agents of the seller indicates that the seller expressed an intent to except a fee interest from the conveyance. Winkelman admits that they did not know they owned any interest in the disputed property. Despite this, Ski Park inexplicably urges this court to find that Winkelman intended to except a fee interest in the former railroad right-of-way land.

The trial court acted properly in interpreting the exception language in favor of Harris. The trial court neither reformed nor changed the deed language, it only explained what the deed meant based on substantial evidence and well recognized principles of deed interpretation. This Court should affirm the decision of the trial court and dismiss this appeal.

Dated this 24th day of April, 1989.

Respectfully Submitted,

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